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GIAN SINGH GURDUR SINGH

v.

KEMPAS EDIBLE OIL SDN BHD

B

HIGH COURT MALAYA, SHAH ALAM
TENGKU MAIMUN J
[CIVIL SUIT NO: 22-967-2006]
3 JULY 2012

C ***CONTRACT:*** *Breach - Damages - Loss of profit - Whether too remote - Transportation contract for period of three years but subject to yearly review prematurely terminated - Whether plaintiff entitled to claim loss of profit for entire duration of three years*

D ***CONTRACT:*** *Breach - Damages - Mitigation of damages - Duty to mitigate loss*

CONTRACT: *Breach - Damages - Proof - Plaintiff to prove fact of damage and its amount*

E ***CONTRACT:*** *Breach - Damages - Remoteness of damages - Loss of profit - Whether too remote*

CONTRACT: *Breach - Proof - Failure to prove alleged breach - Termination of contract premature and unlawful*

F ***CONTRACT:*** *Breach - Transportation contract for period of three years but subject to yearly review - Whether termination before expiry of three years premature*

G ***CONTRACT:*** *Construction - Contract for transportation services - Whether letter of appointment amounted to contract - Contract for period of three years but subject to yearly review - Whether contract for fixed period of three years - Whether court could go behind written terms of contact*

H By a letter dated 4 January 2005 ('exh. P2'), the defendant appointed the plaintiff as their transporter. The contract period was stated to be effective from 1 January 2005 to 30 December 2008 (three years) which was to be reviewed on a yearly basis. *Vide* a letter dated 7 November 2005 the defendant terminated the plaintiff's transportation services effective from 1 November 2005. The plaintiff contended that the appointment was for a fixed period of three years and that the termination was premature and without basis. The plaintiff thus claimed I against the defendant for general damages. The defendant claimed that the plaintiff was appointed on an *ad hoc* basis and that there was no letter of appointment or formal contract executed between them. The defendant claimed that the plaintiff's services were terminated due to

numerous complaints on the plaintiff received by the defendant. The issues which arose for determination were: (i) whether the plaintiff's appointment was for a fixed period of three years or whether it was subject to review; (ii) if it was subject to review, whether upon such review, the contract may be determined earlier than the three year period; and (iii) whether the plaintiff was entitled to damages.

Held (allowing plaintiff's claim):

(1) The letter dated 4 January 2005 formed the contract between the plaintiff and the defendant for the appointment of the plaintiff as the defendant's transporter. Pursuant to the letter of appointment, the contract was to be for three years but this period was not absolute. It was subject to yearly review which meant that the defendant would reassess and reconsider the appointment yearly. (para 20)

(2) When the words are clear and ambiguous, the court should not go behind the written terms of the contact to introduce or add new terms to it. Given the meaning of the word review, the plaintiff's appointment as the transporter, although stated to be for three years, could in fact be determined earlier than the three year period if upon review, the defendant was not satisfied with the services rendered by the plaintiff; *Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors* (refd). (paras 24 & 25)

(3) The defendant had failed to prove that the termination of the plaintiff's services was due to numerous complaints of late deliveries or poor services. (para 29)

(4) Under the letter of appointment, the review process was to be undertaken yearly whereas as at November 2005, the one year period was not due yet. Since the review was yet to be undertaken at that point in time pursuant to the letter of appointment, the termination could not be said to be done pursuant to the review process. Hence, the termination of the plaintiff's appointment *vide* the defendant's letter dated 7 November 2005 was premature and unlawful. (paras 36 & 37)

(5) In claiming damages, the plaintiff must satisfy the court both as to the fact of damage and as to its amount and that the plaintiff must show the extent of damages on the balance of probabilities; *Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd* (refd); *Bumiputra-Commerce Bank Bhd, Kuala Terengganu v. Chendering Development Sdn Bhd & Ors* (refd). (para 39)

A **(6)** The plaintiff's loss of profit was not too remote or indirect and was within the contemplation of the parties. However, given that the three year period was not an absolute period but subject to review yearly, the plaintiff was not entitled to claim for loss of profit for the entire duration of three years. (para 45)

B **(7)** The plaintiff has a duty to mitigate his loss where upon learning of the termination by the defendant, the plaintiff ought to take all reasonable steps to seek business of transporting goods elsewhere (see *Bekalan Sains P& C Sdn Bhd v. Bank Bumiputra Malaysia Bhd*). (para 47)

C **Case(s) referred to:**

Bahamas International Trust v. Threadgole [1974] 1 WLR 1514 ***(refd)***

Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2011] 1 LNS 232 CA ***(refd)***

Bumiputra-Commerce Bank Bhd, Kuala Terengganu v. Chendering Development Sdn Bhd & Ors [2004] 1 CLJ 781 CA ***(refd)***

D *Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors [1989] 1 CLJ 30; [1989] 2 CLJ (Rep) 1 HC* ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

E *Toeh Kee Keong v. Tambun Mining Company Ltd [1967] 1 LNS 197 FC* ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 74

Evidence Act 1950, ss. 73A, 91, 92

F *For the plaintiff - R Kengadharan (R Prabhakaran with him); M/s R Kengadharan & Co*

For the defendant - V Vishnu Kumar (Saifuddin Shahrudin & Surinder Kaur with him); M/s Alvin John & Partners

Reported by Amutha Suppayah

G

JUDGMENT

Tengku Maimun J:

H **[1]** By a letter dated 4 January 2005 ('exh. P2'), the defendant appointed the plaintiff as their transporter. The terms and conditions of the appointment are as follows:

(a) on an outward trip the charges – approx. RM75.00 MT.

I (b) on an inward trip the charges – approx. RM25.00 MT.

(c) Contract period effective from 1 January 2005 – 30 December 2008 (3 years) which will be reviewed on a yearly basis.

(d) All goods loaded and accepted by the transporter is at their responsibility. A

(e) Any short or damaged during transport will be debited to the transporter.

(f) Any cash collected by your contract worker should be reimbursed to the accounts department daily and if there are any default the sum will be debited to the transporter. B

[2] *Vide* a letter dated 7 November 2005 the defendant through one Francis Tan wrote to the plaintiff:

C

Notice of Termination of Transportation Services.

Further to our meeting pertaining to the above, the management has decided to terminate your transportation services with us with effective November 1, 2005.

D

[3] The plaintiff contends that the appointment was for a fixed period of three years and that the termination was premature and without basis. The plaintiff is claiming against the defendant for general damages, interest and costs.

[4] The defence is that the plaintiff was appointed on an *ad hoc* basis E and that there is no letter of appointment and/or formal contract executed between the plaintiff and the defendant.

[5] The defendant further pleads that the plaintiff's services were terminated due to numerous complaints on the plaintiff received by the defendant. F

[6] Parties have formulated several issues but to my mind, the dispute revolves around the following issues:

(i) whether the plaintiff's appointment is for a fixed period of three years or whether it is subject to review; G

(ii) if it is subject to review, whether upon such review, the contract may be determined earlier than the three year period; and

(iii) whether the plaintiff is entitled to the damages claimed. H

The Evidence

[7] In his evidence the plaintiff states that prior to 4 January 2005, he was the transporter for the defendant on an ad hoc basis. By the letter dated 4 January 2005, the plaintiff said that the term of his I appointment is fixed for three years and that there is no term in the letter of appointment that the appointment may be terminated at any time.

[8] The plaintiff states that he asked for explanation from Francis Tan on the words "which will be reviewed on a yearly basis" before he signed the appointment letter and Francis Tan informed him that "review" relates to paras. (a) and (b) of the letter dated 4 January 2005 (ie, the charges) and that it was for the purpose of improving the services of the plaintiff if the service is not satisfactory.

[9] It was further the evidence of the plaintiff that between 4 January 2004 until 1 November 2005 he had not received any complaints nor any show cause letters relating to the transportation services and that there was no review done and that even if the term review exists, one year has not expired from the appointment date.

[10] For the defendant, evidence was led through SD1 and SD2.

[11] SD1 was not in the employment of the defendant at the material time, hence he had no specific knowledge of the contents of the letter of appointment dated 4 January 2005. He said only Francis Tan had complete knowledge of the contents of the said letter of appointment. SD2 similarly had no knowledge of the appointment and termination of the transporters.

[12] Francis Tan had since retired and was not willing to come forward to testify although the defendant did issue a subpoena to him.

[13] SD1 however did state in his witness statement that as a matter of practice, the defendant's appointed transporter services were reviewed yearly for performance appraisals and customer satisfaction. It was further his evidence that, based on the records, there were numerous complaints of late deliveries by the plaintiff and that a meeting was held on 7 November 2005 to discuss the complaints and the plaintiff was given an opportunity to explain but the plaintiff was not able to give a reasonable explanation towards the various complaints made by the customers.

[14] In cross-examination, SD1 admitted that if there was a complaint against the plaintiff, it must be in the defendant's record. Nevertheless he states that he did not have any records on the complaints against the plaintiff (the records he was referring to earlier was in fact the statement of defence). SD1 also admitted that there was no minutes of the meeting on 7 November 2005 and that no show cause letter was issued to the plaintiff before the termination.

[15] SD2 does not recall if there was any reporting on the plaintiff's services but his testimony on the practice to subject the transporter to review is consistent with that of SD1. According to SD2 the review is a form of the Key Performance Indicator to ensure satisfactory rendering of services to the defendant's clients. It is also the evidence of SD2 that the appraisal is not done to terminate but to improve the services.

[16] Learned counsel for the plaintiff submitted that the letter of appointment is absolutely clear and that in the absence of any evidence contradicting the plaintiff's testimony, the appointment of the plaintiff is for the period of 1 January 2005 until 31 December 2008. A

[17] In this regard learned counsel referred to ss. 73A, 91 and 92 of the Evidence Act 1950 to submit that the defendant cannot present any evidence to contradict the contents of the letter of appointment. B

[18] For the defendant it was contended that no formal agreement had been signed between the parties and that the plaintiff's appointment was a continuation of an ongoing contract for the services already rendered by the plaintiff but with a conditional commitment of three years in place of the adhoc appointment. C

Findings

Whether The Plaintiff's Appointment Is For A Fixed Period Of Three Years Or Whether It Is Subject To Review And If Subject To Review, Whether The Contract May Be Determined Earlier Than The Three Year Period D

[19] The dispute in this matter concerns the construction of the letter of appointment dated 4 January 2005 which is entirely for the court to decide (see *Bahamas International Trust v. Threadgole* [1974] 1 WLR 1514). E

[20] There is indeed no formal agreement being drawn up, signed and stamped for the appointment of the plaintiff but I find that the letter dated 4 January 2005 forms the contract between the plaintiff and the defendant for the appointment of the plaintiff as the defendant's transporter. F

[21] I also find that the appointment of the plaintiff *vide* the said letter is not on an ad hoc basis. If the appointment is on an ad hoc basis, there is no need for the letter dated 4 January 2005 to be issued, as prior thereto, the plaintiff had already been transporting the defendant's goods on an ad hoc basis. G

[22] I further find that pursuant to the letter of appointment, the contract is to be for three years but this period is not absolute. It is subject to yearly review which means that the defendant will reassess and reconsider the appointment yearly. The Concise Oxford English Dictionary Eleventh Edition defines 'review' as "a formal assessment of something with the intention of instituting change, if necessary; a critical appraisal of a ... work". H I

[23] The plaintiff testified that Francis Tan had told him that the word "review" relates to the charges. I am not able to accept the evidence as the word "review" in cl. (c) of the letter of appointment which states "contract period effective from 1 January 2005 - 30 December 2008 three years which will be reviewed on a yearly basis" clearly refers to contract period.

[24] When the words are clear and ambiguous, the court should not go behind the written terms of the contact to introduce or add new terms to it (see *Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors* [1989] 1 CLJ 30; [1989] 2 CLJ (Rep) 1).

[25] Given the meaning of the word review, the plaintiff's appointment as the transporter, although stated to be for three years, may in fact be determined earlier than the three year period if upon review, the defendant is not satisfied with the services rendered by the plaintiff.

[26] The above is consistent with the evidence of SD1 and SD2. They testified that yearly review is an annual appraisal to see whether the services of the plaintiff are as expected and that the continuation of the three-year term would depend on this appraisal.

[27] The defendant's position is that the three-year appointment was determinable by early termination if the annual review warranted it. The defendant contended that there were numerous complaints received against the plaintiff's services and that at a meeting held in November 2005, these complaints were discussed which led to the termination of the appointment by way of letter dated 7 November 2005.

[28] The evidence of DW1 is that the termination letter issued before the yearly review is necessitated by the poor services of the plaintiff, ie, that there were frequent late deliveries which were behind schedule. And it was the evidence of the defendant's witnesses that poor delivery is a fundamental breach of the transportation services.

[29] I find the defendant's allegation on the numerous complaints against the plaintiff a bare statement of the defendant's witnesses without a single document to substantiate or to prove the plaintiff's poor services and/or the frequent late deliveries.

[30] Although the defendant admitted that any complaints on the plaintiff would have been in the defendant's records, SD1 and SD2 did not produce any records and were not able to show a single complaint by its clients as alleged.

[31] SD2 confirmed that there were no records available as to what the actual complaints were; that there were no records of any warnings given to the plaintiff and no minutes of the said meeting was available. Putting the documents aside, SD1 could not recall whether he had made any complaints on poor services by the plaintiff.

[32] Given the defendant's witness's own statement that poor delivery services is a fundamental breach of the transportation services, I find it inherently improbable that there is nothing in writing or on record from the customers to the defendant or from the defendant to the plaintiff if indeed the plaintiff's services had been poor.

[33] Although a meeting did take place sometime prior to the letter of termination, I am of the view that the meeting pursuant to which the plaintiff's appointment was terminated *vide* the letter dated 7 November 2005 cannot be considered a review process envisaged under the contract, for the reason that not only has the one year period not expired, but again, it is inherently improbable that such a meeting to discuss or appraise the plaintiff's services, relating to a fundamental breach, as the defendant says, was not put on record.

[34] Further, if the meeting was a discussion of the plaintiff's services, then the plaintiff ought to be given time to remedy any shortcomings or to improve his services. To immediately terminate the services without allowing the plaintiff to improve will render the appraisal process meaningless.

[35] I therefore find that the defendant has failed to prove that the termination of the plaintiff's services was due to numerous complaints of late deliveries or poor services.

[36] Under the letter of appointment, the review process is to be undertaken yearly whereas as at November 2005, the one year period is not due yet. Since the review is yet to be undertaken at that point in time pursuant to the letter of appointment, the termination could not be said to be done pursuant to the review process.

[37] Given the above circumstances, I further find that the termination of the plaintiff's appointment *vide* the defendant's letter dated 7 November 2005 is premature and unlawful.

Whether The Plaintiff Is Entitled To The Damages Claimed

[38] The next issue to be considered is whether the plaintiff is entitled to the damages claimed.

[39] It is trite that in claiming damages, the plaintiff must satisfy the court both as to the fact of damage and as to its amount (see *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635) and that the plaintiff must show the extent of damages on the balance of probabilities (see *Bumiputra-Commerce Bank Bhd, Kuala Terengganu v. Chendering Development Sdn Bhd & Ors* [2004] 1 CLJ 781).

[40] In his statement of claim, the plaintiff is claiming for damages in the sum of RM300,000.

[41] In his evidence, the plaintiff states that to ensure the smooth running of the services to the defendant, he purchased three motor lorries but in his evidence he only gave the registration numbers of two lorries.

[42] The plaintiff further states that upon termination of his services, he suffered loss of income which led to the auctioning of his real property assets and the sale of his lorries.

[43] The plaintiff however did not produce any evidence to support his statement that upon termination of his appointment by the defendant, he had to sell the lorries and his real property assets.

[44] But the plaintiff did give evidence on his loss of profits. He said that between 4 January 2005 and 7 November 2005 the estimated payments received from the defendant was RM280,000 and that 50% of the total income was his profit.

[45] The plaintiff's claim for loss of profit is a proper yardstick in considering the question of damages for breach of contract (see *Toeh Kee Keong v. Tambun Mining Company Ltd* [1967] 1 LNS 197) and the plaintiff's loss is recoverable under s. 74 of the Contracts Act 1950 if it is not too remote or indirect and is within the contemplation of the parties (see *Bumiputra-Commerce Bank Bhd, Kuala Terengganu v. Chendering Development Sdn Bhd & Ors* [2004] 1 CLJ 781).

[46] I find the plaintiff's loss of profit not too remote or indirect and was within the contemplation of the parties. However, given that the three year period is not an absolute period but subject to review yearly, I am of the view that the plaintiff is not entitled to claim for loss of profit for the entire duration of three years.

[47] The plaintiff has a duty to mitigate his loss where upon learning of the termination by the defendant, the plaintiff ought to take all reasonable steps to seek business of transporting goods elsewhere (see *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2011] 1 LNS 232).

[48] Learned counsel for the defendant submitted that the defendant if at all is liable for seven weeks loss of profit (ie, from 1 November 2005 to 31 December 2005) and if the court is minded to grant for a further period, then the very most, such damages cannot exceed for a further period of three months leading to a total period of four months and three weeks.

[49] In light of the above submission and in the absence of any reply from learned counsel for the plaintiff on the same, I will award damages to the plaintiff for a period of four months and three weeks or 19 weeks.

[50] The invoices show that from 4 January 2005 to 7 November 2005 the defendant made payments to the plaintiff in the sum of RM273,868.54.

[51] This amount, as submitted by learned counsel for the defendant to which I agree, gives an average income of RM6705.90 per week which equals to RM127,393.10.

[52] As testified by the plaintiff, 50% of that income is his profit. 50% of RM127,393.10 is RM63,646.55.

[53] Based on all the above, judgment is entered against the defendant for the sum of RM63,646.55 with interest of 4% per annum from 7 November 2005 until realisation and costs of RM15,000.